UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CONF.157/PC/60/Add.4
8 April 1993

Original: ENGLISH

WORLD CONFERENCE ON HUMAN RIGHTS
Preparatory Committee
Fourth session
Geneva, 19-30 April 1993
Item 5 of the provisional agenda

STATUS OF PREPARATION OF PUBLICATIONS, STUDIES AND DOCUMENTS FOR THE WORLD CONFERENCE

Report of the Secretary-General

Addendum

1. The attention of the Preparatory Committee is drawn to the attached study entitled "Enhancing the universal application of human rights standards and instruments" prepared by Mr. Fausto Pocar. The study was commissioned by the Centre for Human Rights pursuant to General Assembly resolutions 45/155 of 18 December 1990 and 46/116 of 17 December 1991.

2. The study covers only part of the third objective of the World Conference on Human Rights; this objective, set out in paragraph 1 (c) of resolution 45/115, is the following:

> "To examine ways and means to improve the implementation of existing human rights standards and instruments".

3. Indicative annotations issued by the Secretariat of the World Conference relating to the theme of the following study are to be found in paragraphs 8 to 10 of document A/CONF.157/PC/20.

GE.93-12614 (E)

ENHANCING THE UNIVERSAL APPLICATION OF HUMAN RIGHTS STANDARDS AND INSTRUMENTS

by

Fausto Pocar

Note: Unedited text for circulation to the fourth session of the Preparatory Committee. The final edited version will be prepared for the World Conference.

CONTENTS

		Paragraphs	Page
I.	Implementation of human rights standards and universalization of existing international instruments	1 - 10	5
II.	Encouraging universal adherence to existing human rights instruments	11 - 25	8
III.	Reservations	26 - 35	14
IV.	Succession of States as to human rights treaties .	36 - 38	18
V.	Recommendations	39 - 44	20

I. IMPLEMENTATION OF HUMAN RIGHTS STANDARDS AND UNIVERSALIZATION OF EXISTING INTERNATIONAL INSTRUMENTS

1. Improving the implementation of existing human rights standards and instruments is no doubt one of the main problems that the United Nations is currently facing in the field of human rights. The adoption of the Charter in 1945 marked a turning point in human history also in this field, as it included the promotion of the universal respect for human rights and fundamental freedoms among the aims of the Organization. Furthermore, Article 55 reaffirms such aim, establishing that "the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". The Charter also provides for a legal obligation of States to this effect, by adding in Article 56 that "all Members pledge themselves to take joint or separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55".

2. As the Charter left open both the problem of identifying the rights and freedoms contemplated by the above-mentioned provisions and that of determining the level of respect of human rights that States must assure in their behaviour, a definition of uniform standards of treatment of the individual was needed, with a view to giving full effect to the international obligation of States in this respect. The first and more general definition of such standards is contained in the Universal Declaration of Human Rights, that is intended to represent, as declared in its preamble, "a common understanding of these rights and freedoms ... for the full realization of this pledge". And it is worth noting that, 20 years later, the Final Act of the International Conference on Human Rights held in Tehran in 1968 proclaimed that "the Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community".

3. Since the adoption of the Universal Declaration, the codification of human rights standards has gone on through the working out of a large number of other instruments adopted by the General Assembly in later years - from simple declarations to conventions with binding effect - which in their turn have helped to define these standards of treatment better, specifying the content of rights already consolidated and adding at times new rights to the ones provided for by the Universal Declaration. While it is clearly unnecessary to list here all these instruments - whose core are the International Covenants of 1966 and the other conventions that preceded or followed them, but also several declarations of principles to be observed for the promotion and protection of human rights - it is important to point out that they cover now almost all areas in which such promotion and protection is needed and that each of them helps to form the frame of reference for defining the content of the obligation provided for by the Charter. It goes without saying that their ratification, in case of treaties and conventions, and their constant application on the part of the States goes a long way to strengthening this frame of reference. All this impressive standard-setting activity would have been incomplete had it not been accompanied by activities and measures intended to promote the implementation of the agreed standards,

in order that they may apply to all the persons concerned in real and concrete terms. One has to bear in mind that the above-mentioned provisions of the Charter put an obligation on Member States to protect human rights as well as to cooperate with the Organization to that end. On the other hand, it is the duty of the Organization itself to encourage and promote the protection of human rights, also in cooperation with Members States.

4. In the light of these provisions, the implementation process is twofold and can be regarded from different points of view. Firstly, it is no doubt a primary obligation of each and every State to implement existing international human rights standards and to observe them in respect to all persons coming within its jurisdiction. Secondly, the United Nations has an important role to play as concerns implementation, offering its cooperation to the States in this regard and making a further guarantee available, at the international level, that human rights are duly observed and protected in compliance with international standards. Both aspects of the implementation process deserve the utmost attention, bearing in mind that only to a certain extent do they constitute separate issues and that their interplay is important in many respects.

5. However, dealing with the implementation of existing human rights standards and instruments also implies a consideration of the scope of such standards and instruments at the international level. As the obligations set out in the relevant provisions of the Charter have a universal character and the same applies to the first and more general identification of the standards to be followed in the fulfilment of such obligations - it is not by mere chance that the 1948 General Assembly resolution identifying and listing such standards was called "Universal Declaration" - it follows that all subsequent international legal instruments adopted within the United Nations system have the same nature or, in the case of treaties - whose scope is, under international law, restricted to States having become parties to them - that they express a tendency to universalization. Consequently, the issue how to make all legal instruments, and especially treaties and conventions, universal is part of the more general implementation process of the Charter and the Universal Declaration of Human Rights.

6. In the light of the above considerations, this paper will mainly deal with the problem of reaching a full participation of States in the wide range of international instruments on human rights and in the implementation of all the standards expressed therein.

7. It has been repeatedly pointed out, and does not need to be further underlined, that human rights, as they belong to human beings, have a universal nature. Consequently, standards of protection should be equally applied worldwide and no discrimination as to their application may be allowed. Since the Universal Declaration of Human Rights, all documents worked out and adopted within the United Nations - be they covenants and conventions, declarations or other documents - have as their starting point the universal nature and the need for universal and non-discriminatory application of the standards of treatment and protection contained therein. Even in the case of standards provided for by treaties and conventions,

their universal nature cannot be denied; it may be also stressed that they represent developments of the Universal Declaration and that they have been adopted by the General Assembly on a consensual basis and firmly recommended for universal acceptance and adherence.

8. Although the universal nature of human rights may suggest that their observance is a general obligation of States, the universal adherence to legal instruments which expressly require a formal acceptance is of crucial importance as far as standards of protection are concerned. As the General Assembly has recognized in its resolution 32/130 of 1977, "it is of paramount importance for the promotion of human rights and fundamental freedoms that member States undertake specific obligations through accession to or ratification of international instruments in this field; consequently the standard-setting work within the United Nations system in the field of human rights and the universal acceptance and implementation of the relevant international instruments should be encouraged" (doc. A/32/45). On the one hand such instruments are intended to better define the content of the rights declared in general terms in the Universal Declaration or otherwise affirmed in international and United Nations practice; on the other hand, they introduce important criteria to be followed by States for the implementation of the rights protected as well as provisions concerning possible limitations of and permissible derogations from certain rights, thus helping to clarify their scope in normal times and, respectively, to identify the cases in which they can be suspended under exceptional circumstances.

9. Furthermore, the monitoring procedures that conventions normally provide for, in order to ensure an international supervision of their implementation by States, serve not only the purpose of encouraging and promoting the adoption of legislative or other measures as may be necessary to give effect to the rights recognized in the conventions. They also play a vital role within the framework of standard setting, helping to work out a common interpretation of such standards and to establish uniform guidelines for bringing about their promotion and certain levels of protection. Therefore, they approach the problem of standard setting in concrete terms, resulting in a better definition of existing standards and in their development through a constructive dialogue between States and supervisory bodies. In this context, the importance of general comments adopted by treaty bodies in respect of various provisions of the conventions under whose authority they act cannot be underestimated, as they reflect the experience acquired in reviewing the situation in various countries, representing different regions of the world and different political, social and legal systems. The role of these comments is not restricted to States parties to the legal instrument under which the monitoring body acts. As the Human Rights Committee has pointed out, they "should also be of interest to other States, especially those preparing to become parties to the Covenant and thus to strengthen the co-operation of all States in the universal promotion and protection of human rights" (CCPR/C/21/Rev.1, p. 1).

10. Besides its impact on the definition of standards of protection, the importance of a universal acceptance of human rights conventions is self-evident as regards implementation at the national level. To this effect, all conventions spell out a clear-cut general obligation of contracting States to adopt implementation measures and some of them add more precise obligations

or guidelines in this respect, specifying certain steps to be taken or measures to be adopted in order to give full effect to the rights recognized. The engagement by all States to implement human rights standards following the same guidelines as set forth in existing legal instruments appears of extreme importance, if the goal has to be that human rights are enjoyed by all individuals and protected by States in a non-discriminatory manner worldwide.

II. ENCOURAGING UNIVERSAL ADHERENCE TO EXISTING HUMAN RIGHTS INSTRUMENTS

11. It is therefore a matter for concern that the human rights conventions which have been adopted by the General Assembly fall far short of universal acceptance as legally binding texts. Although an appreciable increase in the number of States parties to the various instruments has taken place in recent years, none of the treaties is close to having universal adherence. Even the instruments that enjoy the highest number of ratifications and accessions, such as the International Covenants on Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the recent Convention on the Rights of the Child, still lack the adherence of dozens of States.

12. Concern has in particular been expressed in various forums that the two International Covenants - i.e. the instruments that encompass the largest number of rights, as they reflect directly the Universal Declaration - have not yet been acceded to by almost one third of the Member States of the United Nations. In this context, it has also been noted that a number of States has adhered to only one or the other of the two International Covenants. This is particularly unsatisfactory, as it undermines the principle that the two sets of rights covered by them - economic, social and cultural rights on the one hand and civil and political rights on the other - are complementary and indivisible: a principle that has been constantly and unanimously affirmed in various resolutions adopted by the General Assembly and the Commission on Human Rights, as well as in documents of other United Nations and treaty bodies.

13. The General Assembly has repeatedly voiced the above-mentioned concern, by adopting at every session one or more resolutions urging the States that had not yet done so to ratify or to accede to the one or the other convention or to all of them. The importance of acceding to the two Covenants as well as to the Optional Protocol to the International Covenant on Civil and Political Rights has been especially emphasized and the issue is being discussed every year by the Third Committee on the basis of a report of the Secretary-General concerning the status of the Covenants and other conventions. Furthermore, several meetings, workshops and training courses have been organized by the United Nations, in particular by the Centre for Human Rights and its Advisory Services branch, both in geographical areas characterized by a low level of adherence to international instruments and in countries having adhered only to a limited number of such instruments, in order to promote a larger participation therein. Although these efforts and initiatives are certainly important and appreciable and worthy to be continued, the goal of a general adherence cannot clearly be attained by generically drawing the attention of

Governments to the issue. The only concrete step in this regard was taken in 1979 by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, through the adoption of resolution 1B (XXXII), which established a sessional Working Group on the Encouragement of Universal Acceptance of Human Rights Instruments (Report of the Sub-Commission on its thirty-second session, resolution 1B, United Nations, E/CN.4/1350 (1979)). The mandate of the working group was to make requests to Governments that had not yet ratified the principal instruments that they inform the Sub-Commission of circumstances or difficulties preventing ratification or accession, to examine replies and, if necessary, to invite representatives from such Governments for discussion with the working group, and to consider what assistance might be offered to enable them to ratify as soon as possible.

14. During the first years following its establishment the working group received a certain number of replies from various States, notwithstanding some criticism about its legitimacy (i.e. the Sub-Commission's legitimacy) to encourage adherence by requesting information directly from Governments regarding reasons for failure to ratify. Such replies, referring to one or more instruments, enabled the working group to identify, among the grounds for delayed or non-adherence, the following: the length of the preparatory discussions between the federal Government and federate States; the opposition between certain treaty provisions and traditional morals and practices; incompatibility with domestic legislation; bureaucratic inefficiencies and lack of trained personnel, and even the non-availability of the text of some instruments. As far as the Optional Protocol to the International Covenant on Civil and Political Rights is concerned, mention was made of the "optional" nature itself thereof, of the possibility for individuals to submit complaints against States and of the overlapping of the procedure in the Protocol with regional human rights procedures. The discussion of these and other grounds was not followed by the adoption of any meaningful measures by the Sub-Commission or the Commission and after some years the working group itself reduced its meetings and its activity was suspended. Even if the requests of explanations may have played a role in encouraging ratifications to some instruments, the working group's activity cannot be considered as fully successful. Nor may be deemed successful further steps taken by the Sub-Commission to study the problem (see e.g. Sub-Commission resolution 1992/1 entitled "Encouragement of universal acceptance of human rights instruments").

15. Therefore, the need for a new integrated, and not fragmented approach, has been recently pointed out by various bodies and experts, including the chairpersons of human rights treaty bodies at their fourth meeting held in October 1992 (see A/47/628, para. 17). It goes without saying that such an approach, as well as a thorough consideration of the issue, with a view to suggesting practical measures to encourage and facilitate adherence, requires prior identification of the obstacles that adherence to international human rights instruments still encounters and of the possible disincentives to participation therein. Such obstacles may be of a double nature: national and international, depending on the municipal system of the State concerned or on the international activity required from its organs by a particular convention.

16. As to the first aspect, a comprehensive analysis and review of the constitutional and legal framework, as well as of the economic, social and cultural environment of the countries concerned would be necessary in order to identify all possible obstacles to adherence to international instruments. It has also to be underlined that such a study would not be conducted effectively without the active contribution of the competent authorities, institutions and associations, including non-governmental organizations, of the States under consideration. However, in the light of the practice already available from other sources, and subject to further and more detailed analysis, it can be suggested that obstacles may be found on the one hand in the constitutional approach to international law and, as far as federal States or States that do not have a unified legal system are concerned, in problems related to the coordination of different systems at the municipal level; and on the other hand in objective difficulties that State authorities may encounter as to the future application of provisions of the conventions to parts of their territory or of their population. The reasons for such difficulties may be of a different nature, including possible inefficient governmental control over the whole of the territory and insufficient integration or cooperation between different groups concurring to form the country population as well as between the majority thereof and minorities or indigenous groups.

17. Moreover, an obstacle may derive also from an inadequate perception of the principle that respect for human rights is not only an issue coming within the domestic jurisdiction of each State, but is also a matter for international concern and a field in which international cooperation has to play a vital role. Although that principle has gained increased and more general support since its affirmation in the United Nations Charter, the factual behaviour of States is not always inspired by an equal understanding of the principle and its implications in respect of situations occurring within or outside its boundaries. The principle itself is at times looked at suspiciously, as it might lead to undue interference with internal affairs of the country and to inadmissible control on State's sovereignty by foreign countries or international bodies.

18. The just commented attitude may represent an obstacle to adherence to human rights instruments also from the viewpoint of the international activities that conventions require from States parties. As they consist essentially of the cooperation with monitoring bodies established under the various instruments, it is self-evident that the contact with these bodies may be seen as the outward appearance of the above-mentioned interference. Beside this possible approach, it cannot be denied, on the practical side, that a full cooperation with supervisory bodies entails a serious workload, that may constitute a disincentive to acceptance of international conventions, at least under certain circumstances. The continuous increase in the number of conventions dealing with human rights and providing for separate monitoring procedures has also increased the burden put on States becoming parties to all of them.

19. In this respect, the coexistence of several reporting procedures, that have to be complied with on a periodical basis, has been regarded as specially heavy and burdensome by many States. The huge number of overdue reports reveals in itself that a timely compliance with the obligations to report to human rights bodies causes some difficulties to a large number of States.

Further evidence of such difficulties is provided for by debates within the General Assembly and the Commission on Human Rights, as well as within the treaty monitoring bodies, as shown by the reports of the periodical meetings of their chairpersons. While it is not for this paper to analyse all the reasons for delayed submission or non-submission of reports under the different instruments, it must be stressed that awareness of such future heavy workload may operate for a State as a disincentive to participation to the said instruments. This may especially be true for some countries, among them in particular certain developing countries and countries having recently acceded to independence, whose newly established public structures and inadequate available resources may invite to delay any consideration of the ratification of or accession to human rights conventions.

20. In order to meet the difficulties that some States still face to adhere to existing human rights instruments, the cooperation of these States should be sought not only in general terms, by calling upon them to enter the international obligations, as it has been largely done so far. It has been suggested that new methods of persuasion be searched for, including giving regular publicity to the list of non-ratifying States and requests by the General Assembly and other relevant United Nations bodies so that the States in question could offer explanations for their reluctant partnership (see in particular the proposal made at the Nordic Seminar on Human Rights, held in Iceland in June 1991; A/CONF.157/PC/7, para. 10). Whatever new measures may be envisaged, they should not simply consist of putting pressure on the States which are behind in the ratification of and accession to human rights instruments, but rather seek their active cooperation. To this end, they should take into account the need to dispel possible misunderstandings of the previously mentioned kind as to the scope and the purpose of the cooperation that the conventions aim at instituting. When internal obstacles prevent a State from engaging internationally, initiatives should therefore be focused on encouraging the removal of such obstacles and the creation of favourable conditions to international cooperation in this field.

21. To this effect, an analytical study should be undertaken by the General Assembly and/or the Commission on Human Rights, with a view to considering not only obstacles in general terms, but rather specific situations of individual countries. The study would preferably adopt an integrated approach and deal with all existing human rights instruments jointly, including optional protocols as well as optional clauses providing for complaint procedures on the initiative of other contracting States or of individuals who claim to be victims of a violation of their rights. Indeed, it has to be recalled that optional procedures have fallen behind in acceptance rates compared with the substantive texts themselves. Should this information be sought also by way of a questionnaire, the latter should be as specific and concrete as possible. In this context, when the reluctance to participation is not complete, a contribution may also be given by monitoring bodies since they often seek explanations, from the States with which they keep up a dialogue, about the grounds for non-adherence to other related instruments and especially to optional protocols and clauses. When constitutional questions are at issue, legal experts of the countries concerned may provide for important information too.

22. Besides a general call for adherence that could be formally and pressingly made by the World Conference itself and a thorough consideration of the obstacles hindering States from entering international obligations in this field in order to envisage appropriate measures to remove them, an important and more general step in this direction, that may encourage acceptance of human rights instruments at the national level, would no doubt reside in promoting the establishment of national institutions vested with competence to protect and promote human rights and individual freedoms. The importance of such institutions - be they collective or individual bodies, such as mediators, ombudsmen or similar institutions - has been frequently emphasized and there will be no point here in going into a detailed consideration of their structure, composition and mandate. It is only worth recalling that their functions may differ according to the national acts under which they are established, and include administrative or quasi-judicial powers, as well as the competence of issuing opinions, recommendations, proposals and reports that may relate to ensuring that national legislative or administrative provisions conform to the fundamental principles of human rights, that widespread or isolated situations of violations of human rights are adequately dealt with and remedied, that a correct implementation of international standards at the municipal level is carried out by the competent governmental authorities. It can be also maintained that the activity of national bodies performing general and specific functions in the protection and promotion of human rights will play a prominent role in the establishment of favourable conditions to acceptance of the international instruments on human rights and encourage the competent authorities to do so. Indeed, as it has been recently pointed out in the International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris in October 1991 (E/CN.4/1992/43), one of the responsibilities of these bodies should be to encourage ratification of international conventions or accession to them and to ensure their implementation. To this effect, they may also effectively contribute to dispel misunderstandings as to the purpose of international cooperation in this domain and put a correct emphasis on the positive sides thereof.

23. The promotion of the establishment of national institutions may prove to be a far-reaching step also to encourage adherence to international instruments both in regard of individual countries and of geographical areas with a low degree of ratifications, a situation which is probably due to a certain lack of confidence in the international machinery. As to these areas, the existence of national institutions in more than one country of the region or subregion may represent the starting point of an exchange of experiences between them, that may result at the end in forms of cooperation and harmonization of the respective functions and procedures. Far from being factors that may work against universality, these developments would probably operate positively and foster its achievement. On the one hand a regional or subregional cooperation would necessarily put additional pressure on governmental authorities to participate in a larger international cooperation. On the other, it may show the positive aspects of an international sharing of views and experiences, thus helping the competent authorities and the public opinion to gain sufficient knowledge and confidence in the value of the dialogue with international bodies and in the procedures established within the United Nations system.

24. Turning now to other disincentives to acceptance of human rights conventions deriving from the burden thereby imposed on States parties, the measures needed to remove such obstacles may coincide to a large extent with the steps envisaged by treaty bodies to remedy the untimely submission of reports, except of course those intended to put a simple pressure on States parties for the presentation of reports, that would have no impact on the issue under consideration. In the context of a push towards increased adherence only such steps should be explored that may result in alleviating the burden of States parties. As the fourth meeting of persons chairing the human rights treaty bodies has recently recommended, these steps should include "an effort to make the purpose of the reports and the nature of the supervisory process as transparent as possible to all concerned in the process, and especially to government officials; holding, at the national level, seminars and workshops on reporting; and the provision of specifically tailored advisory services, as appropriate" (A/47/628, para. 72). In this context, a better coordination of monitoring bodies aiming at reducing the burden of reporting obligations would also come into the picture: the recent adoption of consolidated guidelines for the initial part of the reports, allowing States parties to fulfil their reporting obligations with regard to the general part of the reports required under the international human rights treaties by submitting the same core document to the various treaty bodies, are to be considered as a step in this direction. The same applies to other initiatives, like the publication of the "Manual on human rights reporting" dealing with six major international human rights instruments, whose purpose is to serve as a practical tool for government officials in the preparation and submissions of reports, as well as a means to assist States parties in the monitoring and implementation of human rights standards: its timely availability in as many languages as possible and in updated versions will no doubt help to reduce the workload that the compliance with reporting obligations entails.

25. It has also been suggested (for the first time by the Chairman of the Committee against Torture at the second meeting of Chairpersons of treaty bodies held in October 1988) that the coordination of treaty bodies could go, for States which are parties to more than one of the treaties, until the replacement of a plurality of reports by one comprehensive and global report which would allow them to deal with all their treaty obligations jointly, thus minimizing the impact of repetitions and continuous updating of certain issues coming under different treaties because of partially overlapping provisions. It may be further suggested, along the same lines, that consideration be given to the feasibility of merging the existing treaty bodies into one single, permanent and comprehensive supervisory body that would consider a global report submitted by States parties to various instruments acting under the authority of each of them. Although it would not only require simple measures of coordination but also amendments to the existing treaties, a development in this sense would radically reduce the reporting burden of States parties, without detracting effectiveness from the current procedures - an issue that must be constantly taken into account when devising new methods and approaches in this field - but rather improving it, as it presently risks to be undermined by the excessive and increasing number of delayed and largely overdue reports. A possible immediate application of this approach, whose

full realization would certainly require adequate time and preparation, may reside in entrusting the supervision of new human rights conventions to the one or the other of the existing treaty bodies, thus avoiding a further proliferation of reporting procedures.

III. RESERVATIONS

26. The universal nature of human rights standards protected under international instruments may be severely undermined by adherence accompanied by reservations entered by States upon ratification or accession. While the negative impact of reservations had not attracted the attention until recently, their increasing number as well as their tenor and scope has raised a certain concern. This is reflected e.g. in resolution 1992/15 of 21 February 1992 of the Commission on Human Rights and in resolution 1992/3 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, that have requested respectively the chairpersons of treaty bodies to study the question of the extent of reservations and the Committee on the Elimination of Discrimination against Women and the Commission on the Status of Women to make their observations on the issue, with a view to considering the desirability of obtaining an advisory opinion from the International Court of Justice, at the request of the Economic and Social Council, on the validity and legal effect of reservations to the Convention on the Elimination of All Forms of Discrimination against Women. The large number of reservations made to the more recent Convention on the Rights of the Child has also raised serious concern, given the doubtful compatibility of some of them with the object and purpose of the convention.

27. An exhaustive consideration of the issue of reservations would go far beyond the scope and purpose of this document. However, it has to be pointed out that, while there is an important and legitimate role for reservations to treaties, these must remain within the limits recognized by international law. According to international law as codified by the Vienna Convention on the Law of Treaties concluded on 23 May 1969 "a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty" (art. 19 of the Convention). A strict observance of the principles contained in this provision is particularly important for human rights treaties, as they are aimed at protecting fundamental rights vested with a universal character.

28. The text of the relevant human rights conventions does not show a clear uniform approach to the issue of reservations. Some instruments explicitly allow reservations or certain reservations, other spell out that no reservations can be made, while others do not mention the question of reservations at all. Thus, as far as the major treaties are concerned, the two Covenants do not contain provisions relating to reservations. The same applies to the Convention on the Suppression and Punishment of the Crime of Apartheid. On the contrary, reservations are expressly authorized in general terms, and subject to their compatibility with the purpose and object of the treaty, by the Convention on the Elimination of All Forms of Discrimination

against Women (art. 28), and the Convention on the Rights of the Child (art. 51). Only the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment authorizes specific reservations concerning the procedures described in articles 20 and 30. As to the International Convention on the Elimination of All Forms of Racial Discrimination, it subordinates reservations to their compatibility with the purpose and the object of the convention in general terms, as other instruments do, but provides for an additional specification, prohibiting reservations "the effect of which would inhibit the operation of any of the bodies established by the Convention" (art. 20).

29. None of the above-mentioned instruments addresses the issue of the definition of the terms under which a reservation has to be deemed incompatible with the convention. An exception is provided for by the International Convention on the Elimination of All Forms of Racial Discrimination, whose article 20 mentions the procedure for objecting to reservations, specifying that "a reservation shall be considered incompatible or inhibitive if at least two-thirds of the States parties to this Convention object to it". Except for this convention, the question of deciding when a reservation is to be considered as permitted by the treaty is particularly delicate in the light of the object and purpose of human rights instruments. According to international law and in particular the Vienna Convention on the Law of Treaties, the primary responsibility for evaluating the compatibility of a reservation lies with the other States parties. When the latter consider that a reservation is incompatible with the object and purpose of the treaty they can lodge an objection to it; however, the absence of objections from a State within a certain period of time entails its tacit acceptance of the reservation. On the other hand, article 21 of the Vienna Convention deals with the legal effect of reservations and of objections to reservations as regards the relations between the contracting States having made them, bearing in mind that, as stated in article 20 (4) b, an objection to a reservation does not preclude the entry into force of the treaty as between the objecting and the reserving State unless a contrary intention is definitely expressed by the objecting State.

30. The impact of these principles and provisions on human rights treaties has not yet been fully and properly explored and defined. This applies, in particular, to the question of the identification of bodies that may be competent to evaluate the compatibility of reservations, when the terms of such compatibility are not specifically addressed in the convention or when a convention, as the Covenants do, ignore the issue of reservations, thus implicitly subordinating their permissibility to the existence of such conditions as prescribed by international law. It has been suggested that, to the extent that a reservation raises a question of interpretation or application of a treaty, the question may be referred to the International Court of Justice. A competence of the Court in this regard is expressly provided for by some conventions. Thus, article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination states that "any dispute between two or more States parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to

another mode of settlement". Similar, though not identical, provisions are to be found in the Convention on the Suppression and Punishment of the Crime of Apartheid (art. XII) and in the Convention on the Elimination of All Forms of Discrimination against Women (art. 29).

31. While these provisions are concerned with the settlement of disputes arising out of the interpretation and application of a convention, the question of a more general competence of the International Court of Justice to give advisory opinions on the legal question of reservations, at the request of any body authorized to make such request by the Charter of the United Nations or in accordance to it, remains open. That competence was recognized by the Court in the Advisory Opinion of 28 May 1951 concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (I.C.J. Reports, 1951, p. 23). While affirming that in the absence of an article in the convention providing for reservations one cannot infer that they are prohibited, the Court has acknowledged the difficulties that an automatic application of the general principles on reservations encounters as regards treaties, whose purpose is purely humanitarian and civilizing and under which the contracting States do not have any individual advantages or disadvantages nor interests of their own, but merely a common interest. The appraisal of a reservation and the effect of objections should therefore depend on the circumstances of each individual case, taking into account on the one hand the intention that the convention would be universal in scope and on the other hand the consideration that the contracting parties could not have intended to sacrifice the very object of the convention in favour of a vague desire to secure as many participants as possible. Moreover, the possible divergence of views on the effect of a reservation as between the reserving State and the parties which object to it and those which accept it, may in the opinion of the Court cause real disadvantages; however, they would be mitigated by the common duty of the contracting States to be guided in their judgement by the compatibility or incompatibility of the reservation with the object and purpose of the convention, since it must be clearly assumed that they are desirous of preserving intact at least what is essential to the object of the convention.

32. Notwithstanding these guidelines given by the International Court of Justice, it cannot be said that all the problems related to the application of the principles concerning reservations to human rights treaties have been exhaustively clarified. In particular, the role of monitoring bodies established under the various human rights treaties in the evaluation of the compatibility of reservations may be a subject for further discussion. In this context, a note has been prepared by the Secretariat at the request of the Committee on the Rights of the Child for submission to the Committee's second session in September 1992. The note recalls precedents on the subject. In particular, at its seventeenth session in 1978, the Committee on the Elimination of Racial Discrimination held a discussion on the question of the legal effects of reservations, declarations and statements of interpretation. A statement was made by the Director of the Division on Human Rights, on the basis of a memorandum by the United Nations Office of Legal Affairs. In the memorandum, in reply to a question concerning the legal effect of a unanimous decision by the Committee that a reservation was incompatible with the object and purpose of the Convention, when that reservation had already been

accepted, it was stated that "the Committee is not a representative organ of the States parties (which alone have general competence with regard to the implementation of the Convention). When a reservation has been accepted (...) a decision - even a unanimous decision - by the Committee that such a reservation is unacceptable could not have any legal effect". At its third session in 1984, the Committee on the Elimination of Discrimination against Women sought an opinion from the Office of Legal Affairs on the scope of admissible reservations. According to this opinion, "for the purpose of considering the progress made in the implementation of the (...) Convention (...) the Committee is to report annually to the General Assembly on its activities" and "may make suggestions and general recommendations based on the examination of reports and information received from States parties". Thus, while the functions of the Committee do not appear to include a determination of the incompatibility of reservations, the Committee might have to comment thereon in its reports as they affect the application of the convention.

33. Furthermore, the issue of reservations has been addressed by the Fourth Meeting of Chairpersons of human rights treaty bodies held in October 1992. On this occasion, the Chairpersons have stressed that the number, nature and scope of the reservations that have been made to the principal human rights treaties are cause for alarm. Consequently, they have suggested that a number of measures should be taken in this regard. As far as the treaty bodies themselves are concerned, these measures should include, whenever a reservation, in the view of the relevant treaty body, gives rise to significant questions in terms of its apparent incompatibility with the object and purpose of the treaty, consideration by that treaty body of requesting the Economic and Social Council or the General Assembly, as appropriate, to request an advisory opinion on the issue from the International Court of Justice. Moreover, treaty bodies should urge States parties that have made reservations to undertake a regular review of the continuing need for, and desirability of, all such reservations. The results of these reviews should be reflected in each report submitted by the State party to the treaty body concerned and should be addressed by each treaty body in its dialogue with the State party. It may be also suggested that each treaty body prepare, within its competence, a study of issues arising out of reservations, with a view to drawing the attention of States parties on such issues and to formulating guidelines for their regular review by those States. Steps in this direction have already been undertaken by some treaty bodies, that have focused their attention on the subject (as shown in previous paragraphs) or have devised, like the Human Rights Committee, to consider the matter with a view to preparing a general comment thereon. On its part, the Committee on the Elimination of Discrimination against Women has recently adopted a general recommendation on reservations, recommending that "States parties should: (a) raise the question of the validity and the legal effect of reservations to the convention in the context of reservations to other human rights treaties; (b) reconsider such reservations with a view to strengthening the implementation of all human rights treaties; (c) consider introducing a procedure on reservations to the convention comparable with that of other human rights treaties" (see general recommendation No. 20, eleventh session, 1992; A/47/38).

34. As far as States which become parties to international human rights instruments are concerned, they should give the most careful consideration to any proposed reservation thereto and do their utmost to keep the number and scope of such reservations to a minimum. They should also avoid making too general reservations and take care that, when a reservation looks absolutely necessary, it is as specific as possible. On the other hand, States which are already parties to a particular treaty should give full consideration to lodging an objection to reservations made by new States acceding to the treaty on each occasion when that may be appropriate.

35. Further consideration to the issue of reservations should be also given by the General Assembly as well as other United Nations bodies dealing with human rights matters. In particular, the General Assembly should be requested by the World Conference to undertake the preparation of an analytical study of issues of incompatibility arising out of the reservations that have been made to the principal treaties, appointing an independent expert to that end, or giving a mandate to the Commission on Human Rights to authorize its preparation by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Such a study would not only serve the purpose of identifying new steps to be taken in order to reduce the number of existing ratifications. It would also help the General Assembly and other competent bodies in the drafting of new human rights treaties, allowing a more careful and in-depth evaluation of the advisability to include in the treaty provisions allowing only specific reservations or, as the case may be, prohibiting them. In this context, whenever certain provisions of a treaty have been identified as being non-derogable under any circumstances (as in the case of art. 4 of the International Covenant on Civil and Political Rights), consideration should be given to whether they should also be identified as not being subject to reservations. Moreover, when a new treaty is being drafted, the most careful consideration should be given, as the Chairpersons of treaty bodies have suggested in their fourth meeting, to the inclusion of a provision permitting the relevant treaty body to request directly an advisory opinion from the International Court of Justice in relation to any reservation which it considers might be incompatible with the object and purpose of the treaty.

IV. SUCCESSION OF STATES AS TO HUMAN RIGHTS TREATIES

36. In connection with universal adherence to human rights treaties, a new issue must be mentioned, that has some legal as well as political implications. Recent developments in international life have led to the existence of an increased number of new States which had previously been constituent parts of other States parties to some of the human rights treaties. In order to avoid that these events turn into lowering the existing level of adherence to such treaties, the question arises to ensure that the people living in those successor States would continue to benefit from the protection afforded thereby. In this connection it has to be pointed out that it is not wholly certain in international law that successor States succeed multilateral treaty obligations of the former State. Some principles and provisions that are laid down in the Vienna Convention on Succession of States in respect of Treaties, concluded on 23 August 1978, may be interpreted in this sense under the circumstances that are here in question. However, that convention having received so far a low number of ratifications and

accessions, it has not yet come into force. Therefore, the issue remains open, whether the principles enshrined therein reflect general principles of customary law or are innovative provisions established in order to further develop international law.

37. Without going into a detailed analysis of the foregoing principles and provisions, it may be maintained that in any event - without prejudging the position that may be taken in relation to other categories of treaties - so far as human rights treaties are concerned, their provisions should be treated as applying, on a continuing basis, to the people within the territories of the new States. Various indicators point in this direction, among them in particular the nature of the conventions aiming at the protection of human rights and fundamental freedoms, whose purpose is not to provide for individual advantages of the contracting States, but rather to reflect their common interest, i.e. the interest of all mankind. The universal application which such conventions aim at represents an additional reason for concluding that, once the people living on a territory find themselves under the protection of an international instrument, such protection cannot be denied to them by virtue of the mere dismembering of that territory and its coming within the jurisdiction of more than one State. It is also worth recalling, in this connection, that this position has been recently taken by the Human Rights Committee as regards the continuing applicability of the International Covenant on Civil and Political Rights to successor States of a former State having been party to it, even before any declaration confirming their succession. By requesting a report from the Governments of Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro) on 7 October 1992, the Committee based its authority on the consideration that "all the peoples within the territory of the former Yugoslavia are entitled to the guarantees of the Covenant". Later on, upon consideration of the reports of the above-mentioned States at its forty-sixth session in November 1992, the Committee further explained (except for Croatia, whose Government had declared to succeed in the meanwhile) that it regarded the submission of the report by the Government of each State and the presence of the delegation as a mere "confirmation" that the new State "had succeeded, in respect of its territory, to the obligations undertaken under the International Covenant on Civil and Political Rights by the former Socialist Federal Republic of Yugoslavia" (see the concluding Comments of the Committee; CCPR/C/79/Add.14 to 16).

38. In the light of the preceding considerations, the view should be taken that human rights treaties devolve with territory and all appropriate measures should be taken to prevent populations living in dismembered States from being deprived of the protection resulting from treaties concluded by the predecessor State. To this end, in order to avoid any misunderstandings on the status of international human rights conventions in this respect, all these new States should be urged, by the World Conference and/or the General Assembly, to confirm formally their succession in respect of any pre-existing obligations undertaken by their predecessor, as from the date of their independence. To this effect, the Secretary-General should be requested to send a note verbale to such new States, fixing a delay and indicating that its expiration without further notice would be considered as implying automatic confirmation of the pre-existing obligations. As regards treaty bodies, they should also consider the matter further and, within their

respective competence, adopt a common view in this respect, taking into account the need to avoid any reduction in the scope of application of the existing instruments. At the same time, all efforts should be made at all possible levels, including in the publication of lists of contracting States of human rights treaties or otherwise, not to offer indirect support to the opposite view that would make the continuity of a treaty conditional upon a declaration of the new State to this effect. The issue should in any case be dealt with as a matter of urgency, in order to ensure the highest possible protection to all persons that had already been under the protection of international instruments on human rights.

V. RECOMMENDATIONS

39. On the basis of the analysis previously carried out, the following list of recommendations is submitted for urgent action to be taken by the World Conference, with a view to improving the universalization of existing human rights instruments. Such action is recommended in order to follow on and strengthen efforts and steps made or that might be made in the future to that effect by United Nations bodies and treaty bodies concerned with human rights matters. Separate action required by such bodies and dealt with in this study is not reproduced hereafter.

40. In order to enhance ratification of existing international instruments, the World Conference should recommend that an analytical study be undertaken by the General Assembly and/or the Commission on Human Rights, aiming at identifying difficulties encountered by States at the municipal level in ratifying human rights instruments. The study should be carried out in cooperation with the States concerned and eventually a Working Group (or a Special Rapporteur) may be established to that effect, that would regularly report to the General Assembly and/or the Commission, as appropriate.

41. The World Conference should consider ways and means to promote the establishment of national institutions on human rights, having among their responsibilities to encourage ratification of international conventions or accession to them, as well as the exchange of experiences with similar institutions in States of the same region or subregion.

42. In order to remove disincentives to acceptance of conventions that may derive from the burden thereby imposed on States parties in the framework of the cooperation with States parties, the World Conference should consider, among the measures intended to improve and facilitate such cooperation, the possibility of rationalizing the reporting obligations by replacing the current plurality of reports by one comprehensive and global report and, in the long term, by merging the existing treaty bodies into one single, permanent supervisory body that would consider such global reports acting under the authority of each of the various instruments.

43. In order to reduce the increasing number of reservations to human rights instruments, the World Conference should make a firm appeal to States parties that reservations be reduced to a minimum. Moreover, further consideration should be given to the problem by requesting the General Assembly to undertake

an analytical study of issues of incompatibility arising out of reservations, appointing an independent expert, or giving a mandate to the Commission on Human Rights (and its Sub-Commission) to that end.

44. In order to ensure that people living in new States having succeeded to States parties to human rights treaties continue to benefit from the protection afforded thereby, the World Conference should adopt a firm position taking the view that human rights treaties devolve with territory, and urge the above-mentioned new States to confirm formally their succession in respect of any pre-existing obligations undertaken by their predecessors, as from the date of their independence. To this effect, the Secretary-General might be requested to send a note verbale to such new States fixing a delay whose expiration would automatically imply confirmation of pre-existing obligations.